IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SHIRL JENKINS MAYS et al. PLAINTIFFS

vs. CIVIL NO. 1:96cv8-D-D

NATIONAL BANK OF COMMERCE et al. DEFENDANTS

**OPINION**

Plaintiff Shirl Jenkins Mays[1] instituted this action alleging a scheme of force-placed collateral protection insurance (CPI) against Defendant National Bank of Commerce ("NBC") and other defendant insurance companies[2] (Defendant Insurers) on behalf of herself and all others whom the defendants subjected to a pattern of force-placed CPI. Mays contends that NBC colluded with Defendant Insurers to force place CPI with exorbitant premiums and without authority on her loan.

Presently before the court is Plaintiff's Motion for Class Certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. Mays seeks to certify and define the class as follows:

> All persons or entities who financed an automobile or other personal property through National Bank of Commerce, or who co-signed a loan, and who were charged for forced placed collateral protection insurance premiums.
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> Specifically excluded from the proposed Class are Defendants, any entity in which any Defendant has a controlling interest, and the officers, directors, affiliates, legal representatives, heirs, successors, subsidiaries, and/or assigns of any such individual or entity, the Judge and members of the Judge's immediate family.

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[1]Although Steven Brand actually filed the original complaint, Shirl Jenkins Mays was substituted as proposed class representative by order of the Magistrate Judge dated July 18, 1996. For brevity's sake and to avoid confusion, the court shall simply refer to the named plaintiff as Ms. Mays throughout this action.

[2]The plaintiff has dismissed her claims against some of the insurance companies, and some of the defendants have third-partied in other insurance companies. These proceedings are irrelevant, however, to this motion for class certification.

Plaintiff's Motion for Class Certification ¶ 2. The court finds Plaintiff's motion well-taken and shall certify the proffered class subject to certain modifications as set forth below.

## FACTUAL BACKGROUND[3]

In 1990, Mays entered into two loan agreements with defendant National Bank of Commerce[4] for the financing of a 1982 Chevrolet Camero and a Toyota Tercel. The financing agreement included the purchase of credit life insurance, which was added to the balance of the loans. From 1990 to 1992, NBC force-placed CPI through the defendant insurers on the plaintiff's loans. The defendant insurers charged arbitrary and excessive insurance premiums which were then added by NBC to the plaintiff's loan balances without authorization. Mays paid these insurance charges which inured to the benefit of the defendants while providing Mays with little or no protection. The plaintiff submits that the defendants colluded together in a pattern or scheme to defraud numerous customers in this same manner.

## LEGAL DISCUSSION

I. FEDERAL RULE OF CIVIL PROCEDURE 23(a)

Mays must meet the prerequisites set out in Rule 23(a), in addition to satisfying either 23(b)(1), (2), or (3), in order to maintain this suit as a class action. Fed. R. Civ. P. 23. See Applewhite v. Reichhold Chems., Inc., 67 F.3d 571, 573 (5th Cir. 1995) (burden of proof on party seeking class certification); Moore Video Distribs., Inc. v. Quest Entertainment, Inc., 823 F. Supp. 1332, 1338 (S.D. Miss. 1993) ("[P]laintiff must make a prima facie showing in its

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[3]When ruling upon a motion for class certification, the court must take the substantive allegations contained in the plaintiff's complaint as true. In re Catfish Antitrust Litigation, 826 F. Supp. 1019, 1033 (N.D. Miss. 1993). The court's recitation of the facts in this case reflects this rule.

4The bank was known at that time as the Bank of Philadelphia.

pleading that it satisfies Rule 23."). Rule 23 provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Mays contends that she meets the prerequisites[5] under 23(a)[6] and also satisfies 23(b)(3) for purposes of establishing liability and compensatory damages. Rule 23(b)(3) permits certification if:

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3). Mays further asserts that certification of claims for punitive damages should be on a mandatory basis pursuant to Rule 23(b)(1) which provides for certification if:

> the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of

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5The requirements of Rule 23(a) are generally referred to as prerequisites of "numerosity, commonality, typicality, and adequacy of representation." General Tel. Co. v. Falcon, 457 U.S. 147, 156, 102 S. Ct. 2364, 2370, 72 L. Ed. 2d 740 (1982); Applewhite, 67 F.3d at 573.

6In addition to the four express requirements set out in the rule, courts have recognized two implicit additional criteria. First, the class must be capable of identification and definition. DeBremaekar v. Short, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam); McGuire v. International Paper Co., 1994 WL 261360, *3 (S.D. Miss. 1994). The second inquiry is whether the representative party is a member of the proposed class. McGuire, 1994 WL 261360, *3.

> conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests . . . .

Fed. R. Civ. P. 23(b)(1). If the court is satisfied, after "rigorous analysis," that all prerequisites have been met, the class may be certified. Falcon v. General Tel. Co., 815 F.2d 317, 319 n.2 (5th Cir. 1987). However, "[t]he district court has wide discretion in deciding whether to certify a class action." Applewhite, 67 F.3d at 573; Jenkins v. Raymark Indus., Inc.782 F.2d 468, 471-72 (5th Cir.), reh'g denied, 785 F.2d 1034 (5th Cir. 1986).

. *Class Definition*

Although neither party directly addressed this issue, the court first addresses "class definition" as a preliminary matter. Mays' proposed definition of the class includes all persons who financed an automobile or other personal property through NBC or who co-signed a loan with NBC and were charged for force-placed CPI premiums. The class appears to be well defined and certainly identifiable. Indeed, it appears logical to the court that NBC itself, in addition to the other defendants and third-party defendants, would have in its possession the relevant documents identifying members. However, the court is initially concerned about the absence of a time limit during which potential class members must have been subjected to the alleged scheme in order to be inducted into the class. In order to assuage this worry, the court shall impose a barrier to class members whose claims are barred by any applicable statute of limitations.[7] Furthermore, more as a formality than anything else, the court notes that the

7The court does not address the merits of the plaintiff's argument that the defendants' alleged fraudulent concealment of the scheme tolls the running of the statute of limitations at this preliminary juncture. Plaintiff's Response to Def.'s Opp. To Motion for Class Cert., p. 2.

proposed class representative, Ms. Mays, is a member of the proposed class set out supra. With those initial prerequisites addressed and not indicating any obstruction to certification as of yet, the court turns its attention to the requirements set forth in Rule 23.

. *Numerosity*

The first explicit requirement of Rule 23(a) is that the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a). Practicability of individual joinder is the main focus, but a court may also consider other factors including the number of claimants and the nature of the action. Watson, et al. v. Shell Oil Co., 979 F.2d 1014, 1022 (5th Cir. 1992) (noting that numerosity requirement imposes no mechanical rules). See General Tel. Co. v. EEOC, 446 U.S. 318, 330, 100 S. Ct. 1698, 1706, 64 L. Ed. 2d 319 (1980); Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1038 (5th Cir. 1981); Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980) (noting court should also consider "ease of identifying [the class's] members and determining their addresses, facility of making service on them if joined and their geographic dispersion."), cert. denied, 449 U.S. 1113, 101 S. Ct. 923, 66 L. Ed. 2d 842 (1981).

The court notes that although the plaintiff and defendants Prudential Property and Casualty Insurance Company ("Prudential") and National Underwriters of Delaware, Inc. ("NUD")[8] agree that the proposed class meets the numerosity requirement for certification

8By order dated February 24, 1997, the undersigned granted the plaintiff's motion to dismiss her claims against Prudential and NUD. Brand, et al. v. National Bank of Commerce, et al., No. 1:96cv008-D-B (N.D. Miss. Feb. 24, 1997) (Davidson, J.) (Order Granting Plaintiff's Motion to Dismiss Certain Defendants Without Prejudice). However, as noted in the order, both defendants have filed cross-claims and had cross-claims filed against them and thus remain parties in this action.

purposes,[9] none offered any evidence in support of their assertions. See Mem. In Supp. Of Plaintiff's Mot. For Class Cert., p. 6-7; Mem. Of Prudential and NUD in Supp. Of Plaintiff's Mot. For Class Cert., pp.6-7 ("All agree the case at bar involves hundreds or thousands of borrowers scattered throughout the state."). However, defendant NBC, who opposes certification, admits in its memorandum brief to the court that "NBC's records reflect that it made 1,528 loans on which a premium for collateral protection insurance was charged and collected." Mem. Of Def. NBC in Response to Plaintiff's Mot. For Class Cert., p.2 (citing McWilliams Aff. In Support of Mot. To Transfer). Faced with these numbers and the fact that loans were probably made to people all over the state and even out of state, it is obvious that Mays has met the numerosity prerequisite. Moore Video Distribs., Inc. v. Quest Entertainment, Inc., 823 F. Supp. 1332, 1339 (S.D. Miss. 1993) (noting that numbers over 40 are usually certified; asserting class of 70 is sufficiently large to satisfy 23(a)). It should also be noted that NBC does not exactly dispute the assertion that the numerosity requirement is met, but merely requests that this court hold a hearing before making such a finding. The court is not inclined to delay a determination when it appears obvious that the class consists of persons too numerous to join in a practical manner.

. *Commonality*

The second prong of Rule 23(a) requires an inquiry into whether "there are questions of

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9Even though defendants Prudential Property and NUD do not oppose, but encourage the court to grant, the plaintiff's motion for class certification, this court "has an independent obligation to decide whether an action [is] properly brought as a class action, even where neither party moves for a ruling on class certification." McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir. 1981). This obligation is further enhanced by the acknowledgment that defendant NBC does oppose the plaintiff's motion for class certification.

law or fact common to the class." Fed. R. Civ. P. 23(a). The Fifth Circuit has held that the threshold of "commonality" is not a high one. Applewhite, 67 F.3d at 573; Jenkins, 782 F.2d at 472. However, "class certification requires at least two issues in common." Applewhite, 67 F.3d at 573; cf. Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993) (requiring all class members share at least one element of cause of action); Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982); Moore Video, 823 F. Supp. at 1239 ("The rule requires only that resolution of the common questions affect all or a substantial number of the class members.").

> The interests and claims of the various plaintiffs need not be identical. Rather, the commonality test is met when there is at least one issue whose resolution will affect all or a significant number of the putative class members. For this reason, the threshold of commonality is not high.

Forbush, 994 F.2d at 1106.

In this action, plaintiff seeks relief on behalf of the purported class pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), and under such common law theories as fraud and breach of contract. The central question to be resolved by this litigation is whether the defendants violated certain state and federal laws by allegedly conspiring to carry out and carrying out a scheme of force placing CPI and charging the CPI premiums to the balance of the loans. Defendants Prudential and NUD list one common issue as whether an insurer or its agent may be held liable for implementing Mississippi Department of Insurance-approved rates, coverages and policy forms. Mem. Of Prudential and NUD in Supp. Of Plaintiff's Mot. For Class Cert., p. 7-8. They also list as factual and/or legal issues common to the class:

(1) whether the lender was authorized by the pertinent loan documentation to procure the CPI in issue; and
(2) whether the plaintiff's breach of contract in failing to maintain voluntary coverage

on the collateral precludes recovery.

Id. The plaintiff's list of common questions is more extensive, the following of which is merely a sampling:

(1) whether Defendant Bank entered into secret agreements with Defendant Insurer and Underwriters to force place Insurer's CPI;
(2) whether the Defendant Bank received kickbacks for forced placing this insurance;
(3) whether Defendant Bank and Insurer engaged in the practice of backdating CPI;
(4) whether Defendant Bank earned interest from excessive premium charges from its practice of adding fraudulently inflated insurance premiums to Plaintiffs' loan balances;
(5) whether the Defendant Bank's conduct violated common law, and constituted negligence, negligent misrepresentation, fraudulent concealment and/or fraudulent misrepresentation; and
(6) whether Defendant Bank violated federal statutes, including Civil RICO.

Mem. In Supp. Of Plaintiff's Mot. For Class Cert., p.7-8. If each class member proceeded individually, each would have to prove the facts underlying this alleged force-placed CPI plan and the illegality of it. "Obviously, individual actions designed to prove identical elements would completely destroy any notions of judicial economy." In re Catfish Antitrust Litigation, 826 F. Supp. 1019, 1034 (N.D. Miss. 1993). Whether or not individual questions predominate over these common issues is better addressed under the auspices of Rule 23(b)(3), but Mays has demonstrated commonality sufficient to satisfy 23(a).

. *Typicality*

The third prong of Rule 23(a) requires the party seeking class certification to demonstrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a). Typicality often overlaps with commonality and adequacy of class representation. In re Catfish, 826 F. Supp. at 1034. However, a prominent consideration exclusive to the typicality requirement is whether "there is an absence of an adverse interest

between the representative parties and other members of the class." Id.. Typicality does not require the claims of the class members to be identical, however. Id. (citing numerous cases). Instead, a typical claim is one which members of the proposed class should reasonably be expected to raise. Id. Substantial similarity of legal theories will also satisfy this third requirement despite strong factual differences. Applewhite v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985).

Mays asserts that her claims are typical of the class due to the fact that NBC "used standardized policies and practices in the implementation of its forced placed collateral protection insurance program, systematically imposing fraudulently excessive premiums." Mem. In Supp. Of Plaintiff's Mot. For Class Cert., p.14. Similarly, Prudential and NUD note that "[a]ll class members' claims turn on the authority of their lender to procure CPI and bill the cost to its borrowers, and the effect of insurance department approval on the rates, coverages and form employed." Mem. Of Prudential and NUD in Supp. Of Plaintiff's Mot. For Class Cert., pp. 8-9. Again, the only party opposing class certification, NBC, merely suggests that more discovery should be conducted as to this issue before the court finds the plaintiff has met her typicality obligations. Mem. Of NBC in Response to Plaintiff's Mot. For Class Cert., unnumbered pp. 3-4. In fact, NBC actually appears to concede this factor by further noting that "it would appear based on the Complaint and the conclusory allegations of the Motion to Certify that the Plaintiff's claim would be typical of all the claims."[10] Id. at unnumbered p. 3.

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10The only specific objection enunciated by NBC concerned the fact that Mr. Brand had sustained damage to his vehicle and received a settlement check from the CPI which NBC had placed on his automobile. NBC contended this action might render Mr. Brand's claims atypical or remove him altogether from the plaintiff class. While the court is unsure what theories those two repercussions might be accomplished, Mr. Brand is no longer the proposed class

The court is of the opinion that Mays has met her burden with respect to this certification factor as well. "[I]n instances wherein it is alleged that the defendants engaged in a common scheme relative to all members of the class, there is a strong assumption that the claims of the representative parties will be typical of the absent class members." In re Catfish, 826 F. Supp. at 1035. Under the allegations in the complaint, NBC and the defendant insurance companies force-placed CPI and charged the premiums to the borrowers based on the balance of the loan anytime the borrower's own insurance coverage lapsed. The defendants implemented this practice regardless of the amount of the loan, the type of loan obtained (personal versus automobile), whether the borrower had a co-signor or where the borrower's home was located. "The diversity of named plaintiffs who differ in their methods of operation and conduct is often cited by defendants as an impediment to class certification. However, as long as the substance of the claim is the same as it would be for other class members, then the claims of named plaintiffs are not atypical." Id. at 1036. The factual variances, if any, cited by NBC are incidental to the legal theories under which Mays brings this lawsuit. Rule 23(a)'s typicality requirement is met in this matter.

. *Adequacy of Representation*

The fourth and final requirement of Rule 23(a) is that the party seeking class certification show that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). This entails an inquiry into whether plaintiff's counsel have the qualifications and experience necessary to competently conduct such a litigation and whether the plaintiff's interests are antagonistic to those of the class. In re Catfish, 826 F. Supp. at 1037. See

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representative and NBC's objection on this factuality is now moot.

Jenkins, 782 F.2d at 472 (noting that court should also question whether representative has sufficient stake in outcome).

The adequacy of the putative plaintiff and plaintiff's counsel is presumed in the absence of specific proof to the contrary. Falcon v. General Tel. Co., 626 F.2d 369, 376 n.8 (5th Cir. 1980), vacated on other grounds, 450 U.S. 1036 (1981). NBC again only addressed the fact that prior putative plaintiff Brand received the benefits of the CPI placed on his loan as alleged evidence of his inadequacy. As the court noted supra, however, the Magistrate Judge upon motion of the plaintiff substituted Mays as the proposed class representative and this objection is now moot. The court is of the opinion that Mays has demonstrated an understanding of the alleged wrongdoing by the defendants sufficient to support a finding of adequacy under this rule. Furthermore, to date Mays has evinced a "willingness and ability . . . to take an active role in and control the litigation." Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 484 (5th Cir. 1982), cert. denied, 463 U.S. 1207, 103 S. Ct. 3536, 77 L. Ed. 2d 1387 (1983); Roper v. Consurve, Inc. 578 F.2d 1106, 1112 (5th Cir. 1978) ("The relevant inquiry is whether the plaintiffs maintain a sufficient interest in, and nexus with, the class so as to ensure vigorous representation."), aff'd, Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980). Mays has demonstrated her adequacy to assume the role of named class representative. Furthermore, plaintiff's counsel have also met their burden in this regard. Plaintiff's counsel have substantial experience with class litigations as well as familiarity with particular issues in the case sub judice. To date they have competently and vigorously maintained this suit, and the court is satisfied with their qualifications. Horton, 690 F.2d at 484 (noting that "adequacy requirement mandates an inquiry into the zeal and competence of the

representative's counsel.").

Accordingly, the court finds that Mays has satisfied the prerequisites set out under Rule 23(a). The court now directs its attention to an analysis of Rule 23(b).

II. FEDERAL RULE OF CIVIL PROCEDURE 23(b)

After satisfying the criteria set out in Rule 23(a), a party seeking class certification must also meet the requirements of Rule 23(b)(1), (2) or (3). Rule 23(b) provides:

> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
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> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
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> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
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> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b).

. *Compensatory Damages Claims Under Rule 23(b)(3)*

Mays contends that, in reference to her claim for compensatory damages,[11] she satisfies 23(b)(3) which provides that, in order to maintain a class action, a party must demonstrate that common questions of fact or law predominate over individual issues and that a class action is the superior method for maintaining the suit. Fed. R. Civ. P. 23(b)(3). "[I]t is not enough for the plaintiff to state a cause of action on his own behalf against the defendants. The plaintiff must state a claim common to all proposed class members." Shivangi v. Dean Witter Reynolds, Inc., 107 F.R.D. 313, 324 (S.D. Miss. 1985). Although "a peek into the merits at this stage is very premature," In re Catfish, 826 F. Supp. at 1039 n.22, "[in] order to make the findings required to certify a class action under Rule 23(b)(3), one must initially identify the substantive law issues which will control the outcome of the litigation." State v. Blue Bird Body Co., 573 F.2d 309, 316 (5th Cir. 1978).

. *Predominance of Common Questions of Fact or Law*

Mays has asserted claims for common law negligence, negligent misrepresentation, fraud, violations of the consumer protection and unfair business practices laws, violations of the civil RICO Act, and breach of contract. Defendant NBC contends that nearly 50% of the plaintiff's allegations relate in some way to a fiduciary duty owed by NBC to the plaintiff. Mem. Of NBC In Response to Plaintiff's Mot. For Class Cert., pp. 5-6. NBC challenges the plaintiff's assertion that individual questions of fact and law predominate because, under the Mississippi law that no fiduciary relation exists per se between a debtor and creditor, each plaintiff must prove the

11As addressed infra, the plaintiff requests certification of her claims for punitive damages under Rule 23(b)(1)(B).

existence of the alleged relationship by clear and convincing evidence. Id. (citing Peoples Bank & Trust Co., 658 So. 2d 1352, 1358 (Miss. 1995)). NBC further questions:

- Whether or not the borrower did, in fact request the bank to obtain insurance through an agent selected by the borrower.
- Whether or not the respective borrowers were insurable and the bank could have, in fact, obtained insurance through an agent of the borrower's choice for the borrower.
- Whether or not individual plaintiffs were provided with documentation concerning insurance.
- Whether or not premiums were, in fact, the subject of refinancing.
- Whether or not threats of repossession were made with respect to individual plaintiffs.
- Whether or not an individual plaintiff did, in fact, suffer a loss of a vehicle
- Whether or not any individual putative class member suffered, in fact, mental and emotional distress within the meaning of the law.
- Whether or not any class member sough medical treatment for purported mental and emotional distress.

Id. at 6.

NBC's arguments do not persuade this court. To recover for the claims alleging breach of fiduciary duty, NBC is correct that under the Peoples Bank standard, such a duty must be proved by clear and convincing evidence. However, NBC is incorrect in asserting that each individual member of the putative class must prove the existence of a fiduciary duty. The whole purpose of certifying a class action is to limit and hopefully avoid repetitive individual determinations of the defendants' common practices and courses of conduct. As the plaintiff points out, "[p]laintiffs' claim that the scheme (alleged in the complaint) was a common practice with respect to all Class members. Once the scheme is proved on a class basis, there is no need to relitigate the existence of the scheme on an individual basis." Plaintiff's Rebuttal, p.6. The court is of the opinion that proving the existence and subsequent breach of a fiduciary duty on a class-wide basis may be analogized to proof of coercion on a class-wide basis. As this court noted in Larry James

Oldsmobile-Pontiac-GMC Truck Co. v. General Motors Corp., "coercion may be implied on a class-wide basis when the defendant's challenged conduct constitutes a uniform agreement common to class members." Cause No. 2:94cv90-D-B, mem. op. at 22-23 (N.D. Miss. Feb. 8, 1996) (Davidson, J.) (Memorandum Opinion and Order Granting Motion for Class Certification) (citing Bogosian v. Gulf Oil Corp., 561 F.2d 434, 450 (3d Cir. 1977), cert. denied, 434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791 (1978); Sunrise Toyota, Ltd. v. Toyota Motor Co., 55 F.R.D. 519 (S.D.N.Y. 1972)). In this case, the plaintiff has alleged that NBC uniformly owed a fiduciary duty to the class when force placing CPI and uniformly breached that duty by contracting with Defendant Underwriter and Insurers for an exorbitant premium, an unnecessary amount of coverage, and an illegal kickback. The above analysis also answers NBC's concerns regarding liability issues.

NBC's second argument pertaining to individual issues focuses on the damages allegedly suffered by the putative class (see numbers 6, 7 and 8 above). While the amount of damages suffered may have to be proved on an individual basis, although the court expresses no opinion as to this matter at this premature time, the fact of injury is common to the class. As set out in the Complaint and Amended Complaint, each class member sustained damages by the forced placing of the exorbitant CPI and the direct or indirect addition of the premiums and other charges related to the CPI to the members' loans. Differences in the amount of damages suffered by each class member will not preclude certification when the "fact of injury" is common to all. In re Catfish, 826 F. Supp. at 1042. The court finds NBC's objections unpersuasive in light of its holding that pecuniary loss in this action is susceptible to common proof.

*ii. Superiority*

The final element under Rule 23(b)(3) requires the party seeking class certification to demonstrate that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The court is convinced that certification of the proposed class will satisfy this final prong. Class certification will safeguard judicial economy by limiting duplicative litigation, and plaintiff will ensure uniform results for similarly situated parties.

. *Compensatory Damages Claims Under Rule 23(b)(1)*

Defendants Prudential Property and NUD assert that the putative class's compensatory damages claims should be certified under Rule 23(b)(1) instead of (b)(3). Several differences exist between these two subsections on certification, one being the ability of class members to opt out of the class.[12] In re Asbestos Litig., 90 F.3d 963, 987 & n.16 (5th Cir. 1996); In re Granada Partnership Sec. Litig., 803 F. Supp. 1236, 1244 (S.D. Tex. 1992). Mandatory certification under Rule 23(b)(1) requires a finding by the court that individual actions would create a risk of "(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a

12Rule 23(c)(2) provides that notice shall be provided to those members of a class certified under 23(b)(3) setting forth the deadline for exclusion and the fact that those who do not request exclusion shall be bound by the judgment. Fed. R. Civ. P. 23(c)(2). No such exclusion provision is delineated for classes certified pursuant to 23(b)(1) or (b)(2). Rule 23(c)(3) further provides that the judgment rendered in a class action certified pursuant to 23(b)(3) shall include those members to whom notice was sent and who did not request exclusion and whom the court finds to be class members, while the judgment in an action maintained as a class under subdivisions (b)(1) or (b)(2) shall bind those whom the court finds to be members of the class. Id. 23(c)(3). No reference is made to class members excluded under 23(b)(1) or (b)(2). Thus, Rule 23(c) endorses by negative implication an interpretation of mandatory class certification pursuant to Rule 23(b)(1) or (b)(2).

practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1).

The most common situation justifying certification under Rule 23(b)(1) is that of the limited fund. Asbestos Litig., 90 F.3d at 982-83; Granada Partnership, 803 F. Supp. at 1244. Likely insolvency of a defendant may render it a limited fund qualifying for treatment under 23(b)(1). Asbestos Litig., 90 F.3d at 983. The Fifth Circuit has noted that the rule itself supports a finding that a defendant's insolvency may support a (b)(1)(B) class action. Id. at 984. "The rule clearly does not distinguish between limited funds which assume insolvency of the defendant and limited funds such as proceeds of an insurance policy which constitute the entire fund from which plaintiffs may recover." Id. It merely allows class actions whenever there is a risk that individual adjudications "as a practical matter" would "substantially impair or impede" class interests. Insolvency of the defendant would most certainly impede the ability of latecomers to receive full payment for their claims.

While the limited fund theory is not the only one available to support certification under 23(b)(1), courts have refused to certify under that subsection solely on the ground that the parties seeking class certification failed to present sufficiently competent evidence indicating that the defendant's assets were insufficient to pay the claims asserted against it. Id. at 983 (citing In re Temple, 851 F.2d 1269, 1272 (11th Cir. 1988); In re School Asbestos Litig., 789 F.2d 996, 999 (3d Cir. 1986). On the other hand, the rule itself does not require proof "to a certainty" that the defendant faces immediate insolvency. In re School Asbestos Litig., 789 F.2d at 984. Defendants Prudential Property and NUD have offered this court no evidence of internal records

tending to indicate the existence of a risk of insolvency or other evidence of a limited fund.

Instead, they submit that mandatory certification is proper for the plaintiff class's compensatory damages claims due to the likelihood of multiple litigation and the subsequent prospect of imposition of incompatible standards of conduct. See Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 527 (E.D. Tex. 1995) (noting that "although the limited fund situation is commonly associated with Rule 23(b)(1)(B), the Rule itself does not require a limited fund."). As a threshold consideration to certification under subpart (b)(1), the court should ascertain whether separate actions would result were the class not certified under this subsection. In re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1544-45 (11th Cir. 1987) (citing Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968); 7A Wright, Miller & Kane, Federal Practice and Procedure § 1773, p.427 (1986)). Defendants Prudential Property and NUD assert that "[i]n the case at bar, multiple litigation is no longer merely a possibility; rather, it is a present reality as evidenced by the numerous CPI-related cases pending in both state and federal courts in Mississippi." Mem. Of Prudential Property and NUD in Supp. Of Response to Plaintiffs' Mot. For Class Cert., p.13. Although the defendants do not direct the court's attention to any specific case filed by a member of the putative class, the court agrees that the risk of multiple litigation is indeed real.

Subsection (b)(1)(A) allows certification where such a risk exists. Furthermore, "[a]s used in the Rule, the requisite 'risk' . . . need not be a certainty or even a better than 50% likelihood. Instead, the term 'risk' refers only to a 'substantial probability,' which has been described as 'more than a mere possibility' but 'less than a preponderance.'" Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 526 (E.D. Tex. 1995). With the amount of CPI litigation

taking place in state and federal courts in Mississippi, the court finds that there exists a substantial probability of multiple litigation. Furthermore, considering the unpredictability of jury trials, there exists a commensurate risk of adjudications establishing incompatible standards of conduct for the defendants.[13] As such, this court is of the opinion that the class, although meeting the standards outlined in Rule 23(b)(3) should be certified pursuant to Rule 23(b)(1).

. *Punitive Damages Claims Under Rule 23(b)(1)*

The plaintiff and defendants Prudential Casualty and NUD request certification of the class's punitive damages claims under the auspices of Rule 23(b)(1). For much of the same reasoning as set out supra, the court is of the opinion that the punitive damages claims should be mandatorily certified. Furthermore, punitive damages are not awarded as compensation for the victim, but instead are meant to create a deterrence to the defendant, punish the defendant, and protect the public interest. Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 474 (5th Cir. 1986) (citing Maxey v. Freightliner Corp., 665 F.2d 1367, 1378 (5th Cir. 1972)). The focus is centered on the defendant's conduct, not the plaintiff's. As such, once subjected to a punitive assessment, the defendant equitably should not be hit again for the same wrongful conduct. As one court commented,

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13Several courts have discussed the issue of which judicial action creates "inconsistent or varying adjudications" sufficient to support certification under Rule 23(b)(1)(A). See, e.g. In re Dennis Greenman, 829 F.2d at 1545. Most have held that actions seeking compensatory damages may not be certified under this subsection, implying that only actions seeking injunctive or declaratory relief may be so certified. Id. "These courts reason that inconsistent standards for future conduct are not created because a defendant might be found liable to some plaintiffs and not to others." Id. If this were so, all actions could be certified under subsection (b)(1)(A), making the remaining subsections of Rule 23 (particularly 23(b)(3)) unnecessary and therefore meaningless. Id. In this action, Mays seeks not only compensatory damages, but also punitive damages and, more importantly, injunctive and declaratory relief.

> It is axiomatic that the purpose of punitive damages is not to compensate plaintiffs for their injury, but to punish defendants for their wrongdoing. In theory, therefore, when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction.

In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983). For these reasons and those set out supra, the court is of the opinion that the class punitive damages claims should be mandatorily certified pursuant to Fed. R. Civ. P. 23(b)(1).

## CONCLUSION

The court is convinced that Mays has satisfied the prerequisites for class certification under Rule 23 and shall grant her Motion for Class Certification. Although the court is of the opinion that the prerequisites under Rule 23(b)(1) and (b)(3) have both been satisfied, the court finds the more proper avenue for certification to be that set forth under Rule 23(b)(1). In so certifying the class, the court notes that it makes no determination as to the merits of this case. Rule 23(d) of the Federal Rules of Civil Procedure grants this court the discretionary power to require adequate notice be given to the members of the certified class. This court shall exercise this power. The court also retains great discretion over the management of this lawsuit. In re Catfish, 826 F. Supp. at 1045. Should class treatment under Rule 23(b)(1) later become inappropriate, the court will not hesitate to take whatever remedial steps are necessary. The class shall be defined as follows:

> All persons or entities who financed an automobile or other personal property through National Bank of Commerce, or who co-signed such a loan, and who were charged for forced-placed collateral protection insurance premiums.
>
> Specifically excluded from the proposed Class are Defendants, any entity in which any Defendant has a controlling interest, and the officers, directors, affiliates,

legal representatives, heirs, successors, subsidiaries, and/or assigns of any such individual or entity, the Judges and members of the Judges' immediate family.

A separate order in accordance with this opinion shall issue this day.

This the ____ day of November 1998.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SHIRL JENKINS MAYS, et al. PLAINTIFFS

VS. CIVIL NO. 1:96CV8-D-D

NATIONAL BANK OF COMMERCE, et al. DEFENDANTS

ORDER GRANTING MOTION FOR CLASS CERTIFICATION

Pursuant to a memorandum opinion entered this day, the court upon due consideration of Plaintiff's motion for class certification, finds that said motion is well taken and it shall be granted. It is therefore ORDERED that

(1) Defendant Wesco Insurance Company's Motion to Suspend Class Certification in which Ross & Yerger joins, is hereby DENIED.

(2) Plaintiff Shirl Jenkins Mays' Motion for Class Certification be, and is hereby, GRANTED under Rule 23(b)(1) of the Federal Rules of Civil Procedure.

(3) The class shall be defined as follows:

> All persons or entities who financed an automobile or other personal property through National Bank of Commerce, or who co-signed a loan, and who were charged for forced-placed collateral protection insurance premiums.
>
> Specifically excluded from the proposed Class are Defendants, any entity in which any Defendant has a controlling interest, and the officers, directors, affiliates, legal representatives, heirs, successors, subsidiaries, and/or assigns of any such individual or entity, the Judges and members of the Judges' immediate family.

(4) Plaintiff Shirl Jenkins Mays be, and is hereby, DESIGNATED AS CLASS REPRESENTATIVE;

(5) the following firms are hereby DESIGNATED AS CLASS COUNSEL: Lawrence

E. Abernathy, III; Barrett Law Offices; Edmond & Vines; Alfred Lee Felder; Herman, Herman, Katz & Cotlar; Jackson, Taylor & Martino; Kitchens & Ellis; Lieff, Cabraser, Heimann & Bernstein; and Murray & Murray; and

(6) class counsel shall cause notice to be mailed by first class mail, postage prepaid, to all members of the class who can be identified through reasonable efforts by February 1, 1999; and

(7) class counsel shall file with the Clerk of the Court by February 15, 1999, an affidavit identifying the persons to whom notice has been mailed.

SO ORDERED, this the ____ day of November, 1998.

_____

United States District Judge